Supreme Court, U.S.
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No. 93-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROBERT D. KEHS, KENNETH LEBON, AND STEVEN C. BILLINGS,

Petitioners,

v.

LARRY EUGENE FOSTER, ROBERT STEWART BLOEMER, JAMES CAMPBELL, NORTHWEST AIRLINES, INC., and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with Rules 12(b) and 56, F.R.Civ.P. and this Court's decisions in Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986), a District Court may grant a defendant's motion for summary judgment, where: the motion is brought before the plaintiff has had a full opportunity for discovery; the defendant fails to identify those material facts which it asserts are not in dispute; the District Court, by denying a timely request for continuance pursuant to Rule 56(f), F.R.Civ.P. and simultaneously granting the motion for summary judgment, deprives the plaintiff of any meaningful opportunity to respond substantively to the motion; and the motion is denominated as one to dismiss or, alternatively, for summary judgment and is supported by factual matter extraneous to the pleadings, and the District Court grants the motion in both of its alternative aspects, without giving notice of how the extraneous factual matter will be treated.

2. Whether, under a labor arbitration agreement containing an express time limit for the issuance of the arbitrator's award, the question of an award's timeliness is an issue of substantive arbitrability for a court or an issue of procedure for the arbitrator, where: the agreement by its terms excludes an award's timeliness from the arbitrator's authority to determine matters of "procedure;" the parties and the arbitrator previously treated the time limit for issuance of an award as mandatory; and the arbitrator expressly assured the parties that he would secure their consent to any departure from the contractual time limit for issuance of an award.

LIST OF PARTIES

Petitioners herein were plaintiffs-appellants in the court below. Respondents herein were defendants-appellees in the court below. Respondent Northwest Airlines, Inc. is a subsidiary of NWA, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on January 28, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported; it is reprinted in Appendix A. (App. A, at A-1 *et seq.*) The decision of the United States District Court for the District of Minnesota (Renner, J.) consists of four unreported Orders, entered on October 19, December 3 and December 21, 1992, and January 11, 1993; those Orders are reprinted in Appendix A. (App. A, at A-4 *et seq.*)

JURISDICTION

Petitioners brought this action in the United States District Court for the District of Minnesota pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, and 28 U.S.C. §§ 1331 and 1337(a). The District Court granted the motion of the individual respondents to dismiss or, alternatively, for summary judgment, and certified its decisions pursuant to Rule 54(b), F.R.Civ.P. Timely Notices of Appeal were filed on January 8 and 20, 1993. The United States Court of Appeals for the Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. On January 28, 1994, the Court of Appeals affirmed the decision of the District Court. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action involves, *inter alia*, the interpretation of Rules 12(b) and 56 of the Federal Rules of Civil Procedure, which are reprinted, in pertinent part, in Appendix B.

STATEMENT OF THE CASE

This action arises from the integration of the pilot seniority lists of respondent Northwest Airlines, Inc. ("Northwest" or the "Company") and Republic Airlines, Inc. ("Republic") following Northwest's acquisition of and merger with Republic. Petitioners are the Merger Representatives of the pre-merger Northwest pilots. The individual respondents (the "Republic Representatives") are the Merger Representatives of the former Republic pilots. The other respondents (named as defendants because they are parties to the arbitration agreement in issue) are the Company and the Air Line Pilots Association, International ("ALPA"), the pilot groups' bargaining representative.

The Roberts Award and the Dispute Resolution Agreement

The Northwest/Republic merger was consummated on August 12, 1986, necessitating the integration of the pilot seniority lists. Pursuant to ALPA's Merger Policy, the lists were integrated by arbitration between the pilot groups' Merger Representatives before an Arbitration Board chaired by neutral Thomas T. Roberts. The Board conducted 57 days of hearings, concluding on February 19, 1988. On November 6, 1989, Mr. Roberts issued his award (the "Roberts Award"), integrating the lists based on each pilot's pre-merger date of hire, and imposing a series of "Conditions and Restrictions," effective until January 1, 2006, in order to render the date-of-hire list fair and equitable. (JA 262 *et seq.*)[1]

On April 26, 1990, as an essential condition of the Company's acceptance of the Roberts Award, the parties executed an agreement (the "Agreement") pursuant to the Railway Labor Act,

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[1] Citations to the Joint Appendix in the Court of Appeals are denominated "JA [page no.]."

45 U.S.C. §§ 151 *et seq.*, establishing procedures for the resolution of disputes under the Roberts Award. The Agreement established a Dispute Resolution Committee (the "DRC"), consisting of representatives of the two pilot groups, to resolve claims concerning the application, implementation, or interpretation of the Roberts Award. In the event of a DRC deadlock, the Agreement provided for arbitration, with Mr. Roberts to chair the Arbitration Board until March 31, 1992. (JA 356 *et seq.*, 379.)

Given the 21 months which transpired between the end of the hearing and the issuance of the Roberts Award, the Agreement imposed specific time limits on the dispute resolution process, including Section VII.G.:

> The arbitrator shall issue an award in writing within ten (10) days after the conclusion of the hearing. All other procedures relating to the arbitration shall be determined by the arbitrator in consultation with the parties, or by the arbitrator after such consultation in the event of lack of expeditious agreement between the parties. (JA 367.)

A number of arbitrations under the Agreement resulted in Supplemental Awards. At Mr. Roberts' request, the parties stipulated that the 10-day period would in all cases mean ten "working days;" they also agreed, ***in particular cases only***, to the calculation of the 10-day period from the date of an executive session of the Arbitration Board. Prior to the events involved here, the time limits of the Agreement were treated as mandatory by Mr. Roberts and the parties, and Mr. Roberts expressly committed that, if he desired any extension of the 10-day limit, he would secure the parties' consent. (JA 195, 201-203, 422-423, 433-434.)

Supplemental Awards Nos. 8 and 9

Supplemental Awards Nos. 8 and 9 precipitated this action. The hearing leading to Supplemental Award No. 8 concluded on November 6, 1991; an executive session of the Arbitration Board was held November 13, 1991. The hearing leading to Supplemental Award No. 9 concluded on November 12, 1991; an executive session was held November 24, 1991. In neither case was there a stipulation that the 10-day period would be counted from the date of the executive session, or would otherwise be extended. Instead, by letter dated December 6, 1991 Mr. Roberts claimed the authority under Section VII.G. of the Agreement unilaterally to "adjust" the 10-day period for issuing an award, and announced that the pending awards would be issued by December 20, 1991. (JA 479.)

Supplemental Awards Nos. 8 and 9 were issued on December 17, 1991. Prior thereto, petitioners advised Mr. Roberts that, the 10-day limit of Section VII.G. of the Agreement having expired, he had no authority to issue the awards. (JA 481-491.)[2]

The Proceedings in the District Court

On December 27, 1991, petitioners filed a Complaint for Declaratory and Other Relief, asserting that Supplemental Awards Nos. 8 and 9 were beyond Mr. Roberts' authority because, *inter alia*, they had been issued beyond the 10-day time limit. On March 6, 1992, petitioners filed a First Amended Complaint, answers to which were filed on or about April 13, 1992.

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[2] Subsequent to the filing of the Complaint in this action, Mr. Roberts convened a hearing, over petitioners' objections, in response to a letter from respondent Foster asserting the existence of an arbitrable dispute over the timeliness of Supplemental Awards Nos. 8 and 9, and issued Supplemental Award No. 10 reiterating his assertion of authority to adjust the 10-day limit.

On June 8, 1992, petitioners served initial Interrogatories and Document Requests on each respondent; extensions of time were agreed to for responses to those requests. Thereafter, petitioners secured leave to file a Second Amended Complaint. In connection with a pre-trial conference on August 11, 1992, petitioners described their additional anticipated discovery, and the Republic Representatives stated that discovery would continue through December 31, 1992. (JA 635 *et seq.*, 639 *et seq.*)

On August 21, 1992, respondents served initial discovery responses, which were incomplete and did not include documents. Four days later -- before petitioners received any documents or could follow up on the initial responses -- the Republic Representatives filed a Motion to Dismiss the Second Amended Complaint, or, in the Alternative, for Summary Judgment, supported by two deposition excerpts and factual materials extraneous to the pleadings. Northwest also submitted extraneous material supporting the motion. (JA 708-843, 1085-1089.)

By letter dated September 23, 1992, petitioners advised the District Court of their assumption, under Rule 12(b), F.R.Civ.P., that in light of the extraneous matter supporting the motion, the motion would be treated as one for summary judgment, and of their intent to request a continuance pending additional discovery under Rule 56(f), F.R.Civ.P. Petitioners asked the District Court to advise them if it intended to treat the motion as one to dismiss. (JA 880 *et seq.*) There was no response from the District Court.

On October 1, 1992, petitioners filed their Rule 56(f) Request, supported (as contemplated by Rule 56(f)) by an affidavit of counsel. (JA 848 *et seq.*, 1044 *et seq.*) In open court on October 15, 1992, the District Court denied that request, and (though acknowledging issues of first impression in the Eighth Circuit) ***simultaneously*** granted the Republic Representatives' motion ***in both of its alternative aspects***. Except for 15 minutes of oral

argument ***after*** the District Court had read from a prepared opinion indicating it would grant the motion, petitioners had no opportunity to respond substantively. (JA 1114 *et seq.*) A Judgment Order was entered on October 19, 1992, dismissing some portions of the Second Amended Complaint, granting summary judgment with respect to others, and granting ***both*** with respect to still others. (App.A, at A-4 *et seq.*)

On October 29, 1992, petitioners filed a Motion to Alter or Amend Judgment Pursuant to Rule 59(e), contending that the District Court erred, *inter alia*, in treating any portion of the Republic Representatives' motion as one to dismiss, where the motion was cast in the alternative and the court had not excluded the extraneous material; and in simultaneously denying the Rule 56(f) request and granting summary judgment. (JA 1163 *et seq.*) In a Memorandum and Order on December 3, 1992, the District Court vacated the October 19, 1992 Order and purported to exclude the extraneous materials, but ***only*** as to the claims it had dismissed; the District Court otherwise denied the motion, and renewed the substance of its earlier rulings. (App.A, at A-7 *et seq.*)

By Order entered, *sua sponte*, on December 21, 1992, the District Court vacated a Judgment entered by the Clerk and certified for appeal, under Rule 54(b),[3] those issues "addressed by the Court's grant of summary judgment on December 3, 1992." (App.A, at A-17 *et seq.*) On January 8, 1993, petitioners filed a Notice of Appeal and, because the December 21 Order certified only those claims disposed of by summary judgment, simultaneously moved for certification of the claims which had been dismissed. (JA 1240 *et seq.*, 1243 *et seq.*) On January 11, 1993, the District Court

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[3] In July 1991 the Republic Representatives filed a cross claim against the Company, which was not disposed of by the District Court. Thus, the ruling on the motion to dismiss or for summary judgment did not constitute a final judgment on all pending matters.

certified the remaining issues (App.A, at A-19 *et seq.*), and a second Notice of Appeal was filed on January 20, 1993. (JA 1252.)

The Proceedings in the Court of Appeals

In the Court of Appeals, petitioners argued, *inter alia*, that the District Court violated the Federal Rules in the respects argued in their Rule 59(e) motion, and that those procedural errors were not cured by the District Court's belated attempt partially to exclude extraneous matter in its December 3, 1992 Order. On January 28, 1994, the Court of Appeals affirmed, concluding that the timeliness of an arbitrator's award is a procedural matter for the arbitrator, based on John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), and McKesson Corp. v. Local 150, Int'l Brotherhood of Teamsters, 969 F.2d 831 (9th Cir. 1992). The Court of Appeals also concluded that the District Court had not abused its discretion in denying the Rule 56(f) request and simultaneously granting summary judgment. (App.A, at A-1 *et seq.*)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON IMPORTANT ISSUES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

As author of the Federal Rules of Civil Procedure and the ultimate supervisory authority over the lower courts, this Court has regularly taken jurisdiction to "review undecided questions concerning the validity and construction" of the Rules. Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964). See Stern, Gressman, Shapiro & Geller, Supreme Court Practice, at 191-192 (7th ed. 1993). This case presents such undecided questions.

From reading the decisions below, one might conclude that the District Court's procedures were unexceptional, ***as if*** the parties had conducted full discovery; ***as if*** the individual respondents filed a conventional summary judgment motion, including a statement of supposedly-undisputed facts; ***as if*** petitioners responded fully to the motion; and ***as if*** the trial court, with the benefit of each party's fully-presented views, rendered a considered decision. As made clear above, ***none of this occurred***:

* ***The Republic Representatives' motion was filed while discovery was at its earliest stage,*** four days after their response to the initial discovery requests; before any documents were produced; and before any follow-up on incomplete responses.

* ***The Republic Representatives did not identify the facts assumed to be true or asserted to be undisputed.***

* ***Petitioners invoked, in good faith, their express right to request a continuance under Rule 56(f).***

* ***The trial court denied the Rule 56(f) Request and simultaneously granted the Republic Representatives' alternative motion in both of its aspects***, without giving notice of its treatment of the extraneous matter; without affording petitioners ***any*** opportunity to respond, other than 15 minutes of oral argument ***after the court read from a prepared decision indicating it would grant the motion***; and in the face of issues ***acknowledged to be ones of first impression***.

These circumstances raise important issues under the Federal Rules.

A. Matsushita, Anderson, and Celotex Increased The Quantum of Evidence With Which a Party Must Respond to a Summary Judgment Motion

Under Rule 56(c), summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of establishing the absence of a genuine dispute as to a material fact. Under Rule 56(e), a party faced with a motion "made and supported as provided in this rule ... may not rest upon the mere allegations or denials of the adverse party's pleading," but must instead "set forth specific facts showing that there is a genuine issue for trial."

In three 1986 cases, this Court clarified these respective burdens. In Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court reversed the denial of summary judgment in a complex antitrust action, stating:

> ... When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. [Citations omitted.] In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a ***genuine issue for trial.***" Fed Rule Civ Proc 56(e)(emphasis added [by the Court]).

475 U.S. at 586. The Court elaborated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), holding that, in determining whether a factual dispute is "genuine," a district court must evaluate the evidence according to "the substantive evidentiary standard of proof that would apply at the trial on the merits." Id., at 252. The Court reasoned that a dispute is "genuine" only "if the evidence is

such that a reasonable jury could return a verdict for the nonmoving party." Id., at 248.

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held that, where summary judgment is sought on "an issue on which the nonmoving party bears the burden of proof," the motion need not be supported by evidentiary material. Instead, the moving party's burden "may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id., at 325. The nonmoving party must then "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id., at 324 (quoting Rule 56(e)).

These decisions "significantly expanded the applicability of summary judgment" by increasing its significance as "a full dress-rehearsal for trial with legal burdens and evidentiary standards to match those that would apply at trial." Issacharoff & Loewenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73, 73, 87 (1991). As a result, summary judgment has found increasing favor in the lower courts.[4] Because a district court must view such a motion as it would a motion for directed verdict after trial, summary judgment becomes, in effect, "some sort of trial itself on the paper record." Childress, *supra* note 4, 116 F.R.D. at 194.

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[4] See, e.g., Jones v. Auto.Ins. Co., 917 F.2d 1528, 1533 n.6 (11th Cir. 1990); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-1481 (6th Cir. 1989); Texas v. Allan Constr. Co., Inc., 851 F.2d 1526, 1533-1534 (5th Cir. 1988); Lake Nacimiento Ranch v. San Luis Obispo County, 830 F.2d 977, 979 (9th Cir.), cert. denied, 488 U.S. 827 (1988); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir.), cert. denied, 484 U.S. 1006 (1988); Issacharoff & Loewenstein, *supra*, at 87-91; Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183, 194 (1987); 10A Wright, Miller & Kane, Federal Practice & Procedure § 2727, at 33 (1993 Supp.).

Cf. Tobey v. Extel/JWP, Inc., 985 F.2d 330, 332 (7th Cir. 1993); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572-1573 (7th Cir. 1989); Street v. J. C. Bradford, *supra* note 4, 886 F.2d at 1481 n.23. As one district court has noted: "A Rule 56 motion puts an end to pre-trial maneuvering and compels the litigants to show the court what they can prove at trial. The rule gives the plaintiff a deadline to come forth with his case, and it provides the strict penalty of dismissal for those who cannot prove a case." Pisa v. Underwriters at Lloyd's, London, 787 F.Supp. 283, 286 (D.R.I.), aff'd mem., 966 F.2d 1440 (1st Cir. 1992).

A party opposing summary judgment is thus all but compelled to respond with everything he could present at trial. As Justice Brennan wrote in dissent in Anderson:

> ... It is hard for me to imagine that a responsible counsel, aware that the judge will be addressing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with ***all*** of the evidence he can muster in support of his client's case.

477 U.S. at 267 (Brennan, J., dissenting)(emphasis in original).[5]

B. The Decision Below Conflicts With Anderson and Celotex and Subsequent Decisions of Courts of Appeals

The greater ***substantive*** burden on a party opposing summary judgment heightens the importance of the ***procedural***

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[5] This is especially true because, under Rule 56(c), the District Court may grant ***partial*** summary judgment. A claimant must take pains to adduce every possible piece of evidence on every issue fairly raised by the summary judgment motion, lest by silence he give up all or some part of his case.

protections of the Federal Rules. If the party must respond with all of his evidence, those procedures must be faithfully adhered to by a district court to assure a fair process. The decision below conflicts with Anderson and Celotex, and with subsequent decisions by other Courts of Appeals, with respect to those procedures.

1. Summary Judgment May be Entered Only after a Full Opportunity for Discovery

a. The Importance of a Full Opportunity for Discovery

In both Anderson and Celotex, this Court recognized that a party opposing summary judgment can meet its burden ***only if it first has a full opportunity for discovery***. In Anderson, the Court stated that, faced with a summary judgment motion,

> ... the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, ***as long as the plaintiff has had a full opportunity to conduct discovery***.

477 U.S. at 257 (emphasis added). See id., at 250 n.5 (assuming "that both parties have had ample opportunity for discovery"); Celotex, 477 U.S. at 326 ("The parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment").

Since these decisions, Courts of Appeals have emphasized that a full opportunity for discovery is an essential precondition for summary judgment. See, e.g., Lawrence Paper Co. v. Rosen & Co., Inc., 939 F.2d 376, 380 (6th Cir. 1991); Kauffman v. Puerto Rico Tel. Co., 841 F.2d 1169, 1172 (1st Cir. 1988); First Chicago

Int'l v. United Exchange Co., Ltd., 836 F.2d 1375, 1380 (D.C.Cir. 1988); Moody v. Maine Central R. Co., 823 F.2d 693, 694 (1st Cir. 1987).[6] The federal courts recognized as much even before Anderson and Celotex,[7] but this Court's decisions underscore the critical importance of this protection: a party facing summary judgment can raise every possible factual issue ***only if he has first had a full opportunity to discover the facts.***

Here, by approving summary judgment with discovery only just begun, the Eighth Circuit acted in conflict with these other decisions. This Court should resolve this conflict.

b. The Increased Importance of Rule 56(f)

In particular, Anderson and Celotex enhance the importance of Rule 56(f), under which a party unable to respond adequately to a summary judgment motion may request "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had ..." In Celotex, the Court stated:

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[6] Even the Eighth Circuit has recognized this requirement. Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins.Co., 958 F.2d 836, 839 (8th Cir. 1992). This Court will grant certiorari on the basis of a conflict within a Circuit, particularly where an important or recurring issue is raised, or to correct especially egregious errors. See Stern, Gressman, Shapiro & Geller, *supra*, at 176-177. Such considerations are present here.

[7] E.g., Cowan v. J.C. Penney Co., 790 F.2d 1529, 1532 (11th Cir. 1986); Sames v. Gamble, 732 F.2d 49, 51-52 (3d Cir. 1984); Schering Corp. v. Home Ins.Co., 712 F.2d 4, 10 (2d Cir. 1983); Murrell v. Bennett, 615 F.2d 306, 310 (5th Cir. 1980); Alabama Farm Bureau Mut. Casualty Co. v. American Fidelity Life Ins. Co., 606 F.2d 602, 609 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); Willmar Poultry Co. v. Morton-Norwich Prod., Inc., 520 F.2d 289, 292-293 (8th Cir. 1975), cert. denied, 424 U.S. 915 (1976).

> Any potential problem with ... premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, ***if the nonmoving party has not had an opportunity to make full discovery***.

Celotex, 477 U.S. at 326 (emphasis added). See Anderson, 477 U.S. at 250 n.5. Cf. Street v. J.C. Bradford, *supra*, 886 F.2d at 1478; Calkin, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Anti-Trust System, 74 Georg.L.J. 1065, 1118 (1986). Even before Anderson and Celotex, Rule 56(f) was to be liberally applied. See 10A Wright, Miller & Kane, Federal Practice & Procedure § 2740, at 532 (2d ed. 1983). Now, when a party opposing summary judgment must, in effect, respond with ***all*** of its evidence, Rule 56(f) becomes perhaps the single most significant provision assuring the party a full opportunity for discovery. Indeed, Celotex appears to ***require*** relief under Rule 56(f) in ***any*** case in which "the nonmoving party has not had an opportunity to make full discovery."[8]

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[8] The Court of Appeals' conclusion that the District Court had not "abused its discretion" in denying the Rule 56(f) request for continuance must be viewed in light of the significance of Anderson and Celotex for the legal standard applicable under Rule 56(f). According to the District Court, the Rule 56(f) request could be granted ***only*** if petitioners showed the existence of essential facts in the exclusive control of respondents. (JA 1135-1136.) While that is ***one*** permissible basis for granting a Rule 56(f) request, see Willmar Poultry v. Morton-Norwich, *supra*, ***it is not the only basis***. Cf. 10A Wright, Miller & Kane, *supra*, § 2740, at 550-551 (where party has been diligent, Rule 56(f) liberally applied). Thus, numerous Courts of Appeals have held that denial of a Rule 56(f) request in the face of incomplete discovery is error. E.g., First Chicago Int'l v. United Exch., *supra*; Garrett v. San Francisco, 818 F.2d 1515 (9th Cir. 1987); Cowan v. J.C. Penney, *supra*; Glen Eden Hosp., Inc. v. Blue Cross & Blue Shield of Michigan, Inc., 740 F.2d 423 (6th Cir. 1984); Sames v. Gable, *supra*.

The Eighth Circuit's decision conflicts with these decisions. Further, the Eighth Circuit's affirmance of the grant of summary judgment ***simultaneously*** with the denial of the Rule 56(f) request conflicts with at least one Circuit. In Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984), after an earlier remand the plaintiff had filed, *inter alia*, a conditional request for continuance under Rule 56(f) in the event the court intended to proceed under Rule 56. The trial court simultaneously denied the request and granted summary judgment. The Sixth Circuit reversed:

> ... We hold that the plaintiff was entitled to a ruling on this properly tendered objection before the court disposed of the entire case ... By simultaneously denying the plaintiff's motion for a continuance and granting summary judgment, the district court deprived the plaintiff of the ... opportunity [to present whatever arguments and evidence he could muster] ... As has been indicated, the plaintiff was entitled to wait until his Rule 56(f) motion was ruled upon before filing a brief.

737 F.2d at 552-553. Given the heightened importance of Rule 56(f), this Court should resolve these conflicts.

2. The Moving Party Must Identify the Facts Asserted to be Undisputed

In Celotex, this Court noted the initial burden on a party moving for summary judgment:

> Of course, a party seeking summary judgment ***always*** bears the burden of ... identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file,

> together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323 (emphasis added)(quoting Rule 56(c)). In concurrence, Justice White (the fifth vote in Celotex) emphasized that, while the movant need not support its motion "with evidence or affidavits," the movant must nonetheless "discharge the burden the Rules place before him." Id., at 328 (emphasis added). The party opposing summary judgment can bring forth ***every*** fact indicating ***any*** possible factual dispute ***only if he has full notice of the facts which the moving party claims are undisputed***.

Since Celotex, the Courts of Appeals have recognized the importance of this initial burden on the movant. The Sixth Circuit, for example, has stated:

> ... Even though the Supreme Court has redefined the moving party's initial burden [citations omitted], the requirement that the movant bears the initial burden remains unaltered. [Citations omitted] ... At the very least, the court must examine the movant's motion to ensure that he has discharged that burden. [Citation omitted.]

Wilson v. Zanesville, 954 F.2d 349, 251 (6th Cir. 1992). See Beatty v. Washington Metropolitan Area Transit Authority, 860 F.2d 1117, 1120-1121 (D.C.Cir. 1988); Windon Third Oil & Gas Co. v. FDIC, 805 F.2d 342, 345 n.7 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987). Cf. Pochahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 216 (4th Cir. 1987).

The decision below conflicts with these decisions, since the Republic Representatives made ***no*** attempt to identify the facts they claimed were undisputed. This Court should resolve the conflict.

3. In the Face of an Alternative Motion to Dismiss or for Summary Judgment Supported by Extraneous Material, a District Court Must Give Notice of Its Treatment of That Material

The Republic Representatives' motion was brought ***in the alternative***, as a motion to dismiss ***or*** for summary judgment, and was supported by extraneous factual matter. Such a motion must be treated ***in its entirety*** either as one to dismiss or one for summary judgment. E.g., Greene v. Union Mutual Life Insurance Co., 764 F.2d 19 (1st Cir. 1985); Wellmaker v. Dahill, 836 F.Supp. 1375, 1378 (N.D.Ohio 1993); In re Scott County Master Docket, 618 F.Supp. 1534, 1548 (D.Minn. 1985), rev'd on other grounds *Sub nom.*, Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987), cert. denied, 484 U.S. 828 (1988); DiPersia v. U.S.R.R. Retirement Board, 638 F.Supp. 485, 486 n.1 (D.Conn. 1986). This is dictated by the express terms of Rule 12(b):

> ... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted,[9] matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Thus, if the district court considers extraneous material, the motion becomes, ***in its entirety***, one for summary judgment; if the district

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[9] While the Republic Representatives' motion did not itself specify the subsection of Rule 12(b) under which it was brought, the argument in the supporting Brief was based on Rule 12(b)(6). (JA 721.)

court elects not to consider that material, the motion becomes, ***in its entirety***, one to dismiss.

In this situation, the Rules impose obligations on the district court to give notice of the intended treatment of the motion. Unless the district court affirmatively gives notice that it will exclude the extraneous matter, "[t]he court [is] ***required by Rule 12(b)*** ... to treat the motion to dismiss as one for summary judgment." Carter v. Stanton, 405 U.S. 669, 671 (1972)(emphasis added). See In re Scott County, *supra*; DiPersia v. Retirement Board, *supra*; 5A Wright & Miller, Federal Practice & Procedure § 1366, at 493-496 (1990). Further, if a district court determines to consider the extraneous material and treat the motion as one for summary judgment, at least one Circuit has held, since Anderson and Celotex, that Rule 12(b) and Rule 56(c) require ***express notice*** to that effect prior to a hearing on the motion. Jones v. Automobile Ins. Co., *supra* note 4.[10]

The Eighth Circuit's decision conflicts with these authorities. The District Court gave ***no*** notice of its treatment of the extraneous material supporting the Republic Representatives'

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[10] The Eleventh Circuit explained:

> ... A successful summary judgment motion results in a final adjudication of the merits of a case. Therefore, it is of the utmost importance that parties are aware of the transformation of the motion to dismiss into a motion for summary judgment, and are able to present to the court materials in support of or in opposition to the motion.

917 F.2d at 1533. This is fully consistent with the implications of Anderson and Celotex discussed above. Indeed, the Eleventh Circuit made clear that "[t]his procedural safeguard is even more valuable in light of [Anderson and Celotex] ..." Id. at 1533 n.6. At the same time, the Eleventh Circuit acknowledged that its holding created a conflict among the Circuits. 917 F.2d at 1533 n.5.

motion, and proceeded to exclude the extraneous material for some purposes and consider it for others, effectively treating the motion as one for ***partial*** dismissal and ***partial*** summary judgment.[11] Indeed, although the motion was cast expressly in the alternative, the District Court dismissed some portions of the Second Amended Complaint, granted summary judgment as to others, and granted ***both*** forms of relief as to still others.[12]

This Court should resolve this conflict as to the relationship between Rules 12(b) and 56 in light of Anderson and Celotex.

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[11] In its initial Judgment Order, the District Court erroneously labelled the motion as a "Motion to Dismiss, or in the alternative, for ***Partial*** Summary Judgment." (App.A, at A-4 - A-5. [emphasis added].) The District Court later acknowledged its "error of law," but ***granted precisely the same relief***. (App.A, at A-7 *et seq.*)

[12] This highlights the importance of notice of the intended treatment of such a motion. Faced with a motion cast flatly in the alternative -- dismissal of the ***entire*** Second Amended Complaint or summary judgment with respect thereto -- petitioners advised the District Court of their assumption that, absent exclusion of the extraneous material, the motion was one for summary judgment. Though that assumption ***was required by the express terms of Rule 12(b)***, it proved to be erroneous in light of the later treatment of the motion. Petitioners ***could not have predicted*** the District Court's hybrid treatment of the motion, and they were left to guess at how the motion would in fact be treated. Since motions to dismiss and motions for summary judgment are governed by different standards, and petitioners ***never*** received notice of the District Court's intentions, petitioners had no opportunity to respond to the motion as the District Court re-cast it.

II.

THE COURT OF APPEALS' CONCLUSION THAT THE TIMELINESS OF AN ARBITRATION AWARD IS AN ISSUE OF PROCEDURE FOR THE ARBITRATOR RAISES ISSUES OF MAJOR PUBLIC IMPORTANCE CONCERNING THE ROLE OF THE COURTS IN LABOR ARBITRATION, AND IS IN CONFLICT WITH DECISIONS BY OTHER COURTS OF APPEALS

A. The Eighth Circuit's Characterization of the Issue as one of Procedure is in Conflict With Other Circuits

This Court has frequently addressed the relationship between courts and arbitrators under the federal common law of labor arbitration, first recognized in Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). See Transportation Communications Employees v. Union Pacific R. Corp., 385 U.S. 157 (1966). In the 1960 "Steelworkers Trilogy," the Court underscored the primacy of arbitration as a method of resolving disputes under labor agreements. Steelworkers v. American Mfg. Corp., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Mfg. Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). At the same time, the Court reiterated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Steelworkers v. Warrior & Gulf, *supra*, 363 U.S. at 582. See AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648-649 (1986). For that reason, whether a particular dispute is within the arbitrator's authority -- "substantive" arbitrability -- ***is for the courts to decide. An arbitrator has no authority to decide whether the parties have agreed to submit a particular dispute to him.*** E.g., AT&T Technologies, *supra*, 475 U.S. at 649; John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-547 (1964).

In John Wiley & Sons, this Court created a limited exception to this judicial role. The Court held that the grievance at issue was arbitrable, but that the timely processing of the grievance was a question for the arbitrator: "Once it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." 376 U.S. at 557.

The present case raises the issue whether an arbitrator's compliance with a contractual time limit for issuing his award is for the courts to decide (as a matter of the arbitrator's compliance with his authority, i.e., substantive arbitrability), or is a matter of procedure for the arbitrator. In numerous cases, a party has claimed that an award was invalid because it was issued beyond a contractual time limit. Regardless of the particular standard applied by the court in each case, ***prior to 1992 every Court of Appeals confronted with such a claim treated it as a question of the scope of the arbitrator's authority – an issue of substantive arbitrability.*** In each case, ***the court*** determined the proper interpretation of the contractual time limit, and ***the court*** determined whether the time limit had been complied with.[13]

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[13] E.g., Schneider v. S.Ry. Co., 822 F.2d 22 (6th Cir. 1987); Hill v. Norfolk & West.Ry. Co., 814 F.2d 1192 (7th Cir. 1987); Jones v. St.L.-S.F. Ry. Co., 728 F.2d 257 (6th Cir. 1984); Huntington Alloys v. Steelworkers, 623 F.2d 335 (4th Cir. 1980); Detroit Coal Co. v. IAM Lodge No. 82, 594 F.2d 575 (6th Cir.), cert. denied, 444 U.S. 840 (1979); Local Union 560, Int'l Bhd. of Teamsters v. Anchor Motor Freight, Inc., 415 F.2d 220 (3d Cir. 1969); Lodge No. 725, IAM v. Mooney Aircraft, Inc., 410 F.2d 681 (5th Cir. 1969); West Rock Lodge No. 2120, IAM v. Geometric Tool Co., 406 F.2d 284 (2d Cir. 1968); Bhd. of Ry. Clerks v. Norfolk & S.Ry. Co., 143 F.2d 1015 (4th Cir. 1944). See Grinnell Hous.Devel. Fund Corp. v. Local 32B-32J, SEIU, 767 F.Supp. 673 (S.D.N.Y. 1991); Pelham Parkway Nursing Home v. Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, 132 LRRM 2744 (S.D.N.Y. 1989); Schafer Bakeries, Inc. v. Int'l Bhd. of Teamsters Local 332, 650 F.Supp. 753 (E.D.Mich.

The Eighth Circuit's holding conflicts with these decisions.[14] The sole support found by the Eighth Circuit -- and by the trial court -- is McKesson Corp. v. Local 150, Int'l Brotherhood of Teamsters, 969 F.2d 831 (9th Cir. 1992). The Ninth Circuit's holding that "[t]he question of the authority of the arbitrator to issue an award after the [contractual] period involves ... a procedural matter," id., at 834, also conflicts with the treatment of this issue by other Courts of Appeals.

This conflict relates to an important question under the federal labor laws, for the willingness of parties to enter into arbitration agreements would be "drastically reduced" if the arbitrator had the "power to determine his own jurisdiction." AT&T Technologies, *supra*, 475 U.S. at 651, citing Cox, Reflections Upon Labor Arbitration, 72 Harv.L.Rev. 1482, 1509

1986); In re American Airlines, Inc., 633 F.Supp. 723 (E.D.N.Y. 1986); Hotel, Motel, Restaurant & Hi-Rise Employees Local 355 v. Fontainbleau Hotel Corp., 423 F.Supp. 83 (S.D.Fla. 1976); Automobile, Transport Chauffeurs, Demonstrators & Helpers Local Union No. 604 v. Placke Chevrolet Co., Inc., 382 F.Supp. 1156 (E.D.Mo. 1974); Int'l Union of Petroleum & Indus. Workers v. Standard Oil Co., 378 F.Supp. 1278 (C.D.Cal. 1973). Cf. IBEW Local 637 v. Davis H. Wlliot Co., Inc., 127 CCH Lab.Cases ¶ 10,952 (4th Cir. 1993).

[14] The court below obviously assumed that, by making timeliness a procedural issue, it eliminated any role for the courts in reviewing an arbitrator's conduct. To the contrary, some Courts of Appeals have held that an arbitrator's procedural decisions are subject to review in the same manner as his ultimate decision on the merits. E.g., Barnard v. Commercial Carriers, Inc., 863 F.2d 694, 697 (10th Cir. 1988); Local Union 89 v. Moog Louiville Warehouse, 852 F.2d 871, 875 (6th Cir. 1988); Local 771, IATSE v. RKO General, Inc., 546 F.2d 1107, 1113 (2d Cir. 1977). As one court has stated, "[t]he violation of an express and explicit restriction on the arbitrator's power cannot be a plausible interpretation" of the applicable contract. Federated Employers of Nevada, Inc. v. Teamsters Local 631, 600 F.2d 1263, 1265 (9th Cir. 1979). See Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987)("The arbitrator may not ignore the plain language of the contract"). Cf. Steelworkers v. Cherokee Elec. Coop., 485 U.S. 1038 (1988)(White, J., dissenting from denial of certiorari).

(1959). This Court explained that, "[w]ere this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered 'to impose obligations outside the contract limited only by his understanding and conscience'." 475 U.S. at 651, quoting Cox, *supra*, 72 Harv.L.Rev. at 1509. See John Wiley & Sons v. Livingston, *supra*, 376 U.S. at 547. This Court should resolve the conflict.

B. The Decision Below Raises Important Questions of Labor Contract Interpretation

The Eighth Circuit's view that the timeliness of an award is ***always*** a question for the arbitrator implicates basic labor contract principles. As with any contract, the first rule in interpreting a collective bargaining agreement is to give the words of the agreement their ordinary meaning. NLRB v. Superior Forwarding, Inc., 762 F.2d 695 (8th Cir. 1985). Cf. Textile Workers v. Lincoln Mills, *supra*, 353 U.S. at 457. In addition, the parties' unwritten practices are uniquely significant under a labor agreement as "a new common law -- the common law of a particular industry or of a particular plant." Steelworkers v. Warrior & Gulf, *supra*, 363 U.S. at 578-579. See Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 311 (1991); Transportation Communications Employees v. Union Pacific, *supra*, 385 U.S. at 160-161.

Even were the timeliness of an award generally an issue of procedure under John Wiley & Sons, in this case that "procedural" label collides with these principles of contract interpretation. The decision below, leaving the enforcement of a time limit ***in all cases*** to the arbitrator, renders the parties' language, bargaining history, and practice ***irrelevant***, eliminating any opportunity for the parties to negotiate ***their own language*** and develop ***their own practice*** for the resolution of the issue. Here, Section VII.G. of the Agreement provides:

> The arbitrator ***shall*** issue an award in writing within ten (10) days after the conclusion of the hearing. All ***other*** procedures relating to the arbitration shall be determined by the arbitrator ... (JA 367 [emphasis added].)

Given the ordinary meaning of the words "shall" and "other," Section VII.G. imposes an obligation on the arbitrator, and excludes the 10-day limit from the "procedures relating to the arbitration" which are to be "determined by the arbitrator."[15] Moreover, prior to Supplemental Awards Nos. 8 and 9, ***the parties and Mr. Roberts had treated the time limit as mandatory, and Mr. Roberts had assured the parties that he would secure their consent to any extension or modification of the time limit.***[16]

By appearing to render such facts irrelevant, the Eighth Circuit has acted in conflict with other Courts of Appeals. The Sixth Circuit stated, in holding an untimely grievance inarbitrable:

> ... The court must first determine from the contract provisions dealing with arbitration, the particular grievances are to be subject to arbitration. It will not do to characterize something as "procedural" and conclude automatically that

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[15] Even "procedures" determined by the arbitrator under Section VII.G. must be determined "in consultation with the parties." Here, Mr. Roberts ***made no effort to "consult" or communicate in any way with the parties prior to his unilateral determination that he possessed the authority to "adjust" the time limit.***

[16] Mr. Roberts' action in securing a stipulation that the 10 days would be treated as 10 "working days" can ***only*** be explained if he and the parties viewed the time limit as mandatory and understood that he lacked the authority to act unilaterally. If the time limit were mere verbiage, or if Mr. Roberts had the authority unilaterally to "adjust" the time limit (as he later asserted), no such stipulation would have been needed.

"procedural" matters are for the arbitrator ***if the parties have specified otherwise*** in the arbitration section itself.

Local Union 89 v. Moog Louiville Warehouse, 852 F.2d 871, 873 (6th Cir. 1988)(emphasis in original). Cf. Volt Information Sciences, Inc. v. Board of Trustees, Leland Stanford Junior University, 489 U.S. 468, 475-476 (1989)(under Federal Arbitration Act, parties free to reserve procedural issue to the courts). Even in McKesson, the Ninth Circuit recognized that the parties to an arbitration agreement could agree to remove procedural issues from the arbitrator's authority. 969 F.2d at 834. This Court should resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 28, 1994

APPENDIX A
OPINIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-1194/1216

Robert D. Kehs; Kenneth LeBon; Steven C. Billings, as Merger Representatives of the Northwest Pilots,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Larry Eugene Foster; James Campbell; Robert Stuart Bloemer, as the Merger Representatives of the former Republic Pilots; Northwest Airlines, Inc., a Minnesota Corporation; Air Line Pilots Association International, an unincorporated labor organization,	*	[UNPUBLISHED]
Appellees.	*	

Submitted: November 8, 1993
Filed: January 28, 1994

Before BEAM, Circuit Judge, LAY, Senior Circuit Judge and BOGUE,* Senior District Judge.

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* The HONORABLE ANDREW BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

PER CURIAM.

Kehs, LeBon and Billings, merger representatives of the Northwest Airlines Pilots, appeal the district court's dismissal of their action challenging an arbitrator's decision in favor of Foster, Campbell and Bloemer, merger representatives of the former Republic Airlines Pilots. We affirm.[1]

This action involves the merger of Republic Airlines and Northwest Airlines. At issue here are an arbitrator's award which integrates the seniority lists of the two airlines and various other disputes involving the application, implementation and interpretation of the award. In district court, the Northwest pilots challenged the arbitrator's finding on the issue of timeliness of the arbitrator's decision. The district court ruled that the timeliness issue was a procedural matter expressly reserved for the arbitrator. We agree. Procedural questions which grow out of an arbitrable dispute and bear on its final disposition should be left to the arbitrator. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964). Timeliness is such a procedural issue. McKesson Corp. v. Local 150 IBT, 969 F.2d 831, 834 (9th Cir. 1992).

The Northwest Pilots also assert that the district court abused its discretion in denying their Fed. R. Civ. P. 59 motion. They assert that the district court abused its discretion in denying a motion for a continuance and in converting their motion to dismiss to a motion for summary judgment without providing them time to respond. We find no abuse of discretion. We agree with the well-reasoned and thorough opinion of the district court and affirm in accordance with 8th Cir. R. 47B.

[1] The former Republic Pilots have filed a motion to dismiss the appeal. That motion is rendered moot by this decision.

In view of the foregoing, the order of the district court is affirmed.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ROBERT D. KEHS, KENNETH LEBON, and STEVEN C. BILLINGS, as the Merger Representatives of the Northwest Pilots,

Plaintiffs,

v.

ORDER
Civ. No. 3-91-827

LARRY EUGENE FOSTER, JAMES CAMPBELL, and ROBERT STUART BLOEMER, as the Merger Representatives of the former Republic Pilots,

NORTHWEST AIRLINES, INC., a Minnesota corporation,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated labor organization,

Defendants.

This matter came on for a hearing before the Honorable Robert G. Renner on October 15, 1992 upon the Motion to Dismiss,

or in the alternative, for Partial Summary Judgment of defendants Foster, Campbell, and Bloemer. The defendant Air Line Pilots Association joined in the motion and the defendant Northwest Airlines submitted a Memorandum of Law in support of the motion. Richard Watt and Richard Williams, Jr. appeared on behalf of the plaintiffs. Daniel Katz and Greg Corwin appeared on behalf of the defendants Foster, Campbell, and Bloemer. Robert Hobbins appeared for defendant Northwest Airlines. Robert Atmore and Jonathan Cohen appeared on behalf of defendant Air Line Pilots Association.

Based on the file, the entire record, the arguments of counsel, and the Court's bench ruling, IT IS HEREBY ORDERED that:

1. the Motion to Dismiss all of the plaintiffs' claims under the Minnesota Arbitration Act is granted because these claims are preempted by the Railway Labor Act and thus fail to state a claim upon which relief can be granted;

2. the Motion to Dismiss all of the plaintiffs' claims based on the Arbitrator's bias is granted because these claims fail to state a claim upon which relief can be granted;

3. the Motion to Dismiss all of the plaintiffs' claims based on allegations that the Arbitrator misinterpreted the contract and that his reasoning and rulings were inconsistent is granted because these claims fail to state a claim upon which relief can be granted;

4. the Motion to Dismiss the claims based on the untimeliness of Supplemental Awards Nos. 8 and 9 is granted because the issue is a procedural one which this Court has no jurisdiction to review;

5. alternatively, the Motion for Summary Judgment on the claims based on the untimeliness of Supplemental Awards Nos. 8 and 9 is granted because the plaintiffs present no genuine issue of material fact as to whether the lateness of the awards was unreasonable;

6. the Motion for Summary Judgment on the claim that the Dispute Resolution Agreement did not contain a page 17 and a § X granting the Arbitrator the power to interpret the Agreement is granted because the plaintiffs cannot raise a genuine issue of material fact with respect to this claim;

7. the Motion to Dismiss the claims with respect to Supplemental Award No. 11 is granted [sic] these claims fail to state a claim upon which relief can be granted;

8. the plaintiffs' request for a continuance pursuant to Fed. R. Civ. P. 56(f) is denied because the plaintiffs failed to demonstrate that they merit a Rule 56(f) continuance.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 19, 1992

ROBERT G. RENNER, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ROBERT D. KEHS,
KENNETH LEBON, and
STEVEN C. BILLINGS,

Plaintiffs,

v.

LARRY EUGENE FOSTER,
JAMES CAMPBELL, and
ROBERT STUART
BLOEMER,

NORTHWEST AIRLINES,
INC.,

and

AIR LINE PILOTS ASSO-
CIATION, INTERNA-
TIONAL,

Defendants.

Civ. No. 3-91-827
MEMORANDUM
AND ORDER

BACKGROUND

Before the Court is the plaintiffs' Motion to Alter or Amend Judgment Pursuant to Federal Rule 59(e). The plaintiffs allege that the Court's Order of October 19, 1992 violated Fed. R. Civ. P. 12 and 56 and is "a gross abuse of the Court's discretion." Plaintiffs' Motion (hereinafter Pl. Mtn.) ¶ 8.

The plaintiffs assert that the Court committed three errors. First, the plaintiffs contend that the Court improperly dismissed portions of the plaintiffs' Complaint without explicitly excluding matters outside the pleadings submitted by the defendants as required by Fed. R. Civ. P. 12(b). Id. ¶ 5. Second, they insist that the Court improperly failed in two ways to give them a "reasonable opportunity" to respond to the defendants' motion. Id. ¶ 6. Third, the plaintiffs claim that the Court's judgment "violates the elementary standards for reviewing motions to dismiss and for summary judgment." Id. ¶ 7.

DISCUSSION

According to the Eighth Circuit,

> "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment. . . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time."

Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir.), cert. denied, 488 U.S. 820 (1988) (quoting Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir.), as amended, 835 F.2d 710 (7th Cir. 1987).

I. The Court Failed Explicitly to Exclude Matters Outside the Pleadings as Required by Rule 12(b)

The plaintiffs' first claim of error rests on the Court's failure to explicitly exclude from consideration matters outside the

pleadings in dismissing certain portions of the Second Amended Complaint. As the plaintiffs note, Rule 12(b) requires that when matters outside the pleadings are presented to and not excluded by the Court, a Rule 12(b)(6) motion to dismiss is to be "treated as one for summary judgment." This Rule 12(b) conversion requirement appears intended to ensure that the nonmovant is able adequately to respond to the submission by the movant of matters outside the pleadings.

The defendants entitled their motion as one to "Dismiss the Second Amended Complaint, or, in the Alternative, for Summary Judgment in Their Favor." Therefore, the Local Rule 7.1 briefing schedule was followed. Under Local Rule 7.1 the plaintiffs had the opportunity to submit any matters that Rule 56 entitled them to submit. Hence, the plaintiffs had "a reasonable opportunity to present all material made pertinent . . . by Rule 56." Fed. R. Civ. P. 12(b). Thus, the defendants' motion was treated in every way as a motion for summary judgment except that the Court stated that it was dismissing, rather than granting summary judgment against, certain of the plaintiffs' claims. The Court thus believes that the purposes of the Rule 12(b) conversion requirement have been fully satisfied. Nevertheless, under the plain language of Rule 12(b) the Court appears to have committed an error of law. Therefore, the Court will vacate the Order of October 19 and reenter judgment against the plaintiffs in conformity with Rule 12(b).

II. The Plaintiffs had a Reasonable Opportunity to Respond to the Defendants' Motion

The plaintiffs' second claim of error is that the Court denied them a reasonable opportunity to respond to the Defendants' motion. Pl. Mem. at 7. This claim is based on two separate arguments.

a. The Court's Action Did Not Violate the Rule 12(b) Requirement of a Reasonable Opportunity to Respond

First the plaintiffs assert that the Court failed to afford them a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" as required by Rule 12(b). Plaintiffs' Memorandum (hereinafter Pl. Mem.) at 7. This claim rests on the assertion that, because the Court's dismissal order failed to explicitly exclude matters outside the pleadings, the Court was required to "**give the [plaintiffs] advance notice of its intent not to exclude the extraneous materials**, in order that the [plaintiffs] may respond to the motion under Rule 56." Id. (italicization and bolding in the original).

This argument can be disposed of quickly. As stated above, the defendants' motion was for dismissal or alternatively for summary judgment. Therefore, as stated above, the plaintiffs had both notice that the motion might be treated as one for summary judgment and the opportunity to respond with supporting materials outside the pleadings. See Washington v. Allstate Ins. Co., 901 F.2d 1281, 1284 (5th Cir. 1990) ("[T]he notice required is only that the district court could treat the motion as one for summary judgment, not that the court would in fact do so." (emphasis in original)).

The vacuousness of the plaintiffs' argument is underscored by their attempt to have it both ways. The argument the plaintiffs now make in support of their motion for reconsideration implies that they had previously presumed that the Court would not treat the defendants' motion as one for summary judgment. However, in their request for a continuance, the plaintiffs clearly indicated that they would treat the defendants' motion as one only for summary judgment. Plaintiffs' Request for a Continuance at 2.

The hollowness of this argument is further underscored by the irrelevance of the three cases the plaintiffs cite. See Court v. Hall County, 725 F.2d 1170, 1172 (8th Cir. 1984); Woods v. Dugan, 660 F.2d 379, 381 (8th Cir. 1981); Jensen v. Klecker, 599 F.2d 243, 245 (8th Cir. 1979). In each of these cases the issue before the court had been identified solely as a motion to dismiss. Nevertheless, in each case the court considered matter outside the pleadings without giving the nonmovant advance notice that it would do so. Moreover, in none of these cases did the nonmovants have a meaningful opportunity to submit any matter outside the pleadings in support of their position. Thus, these cases are simply inapposite.

b. The Simultaneous Denial of a Continuance and Grant of the Defendants' Motion was Proper

Second, the plaintiffs assert that the simultaneous denial of the request for a continuance and grant of the defendants' motion ignored the Rule 12(b) requirement of a [sic] opportunity to submit pertinent materials under Rule 56. Pl. Mem. at 8-9. The plaintiffs insist that this action "effectively nullified the right created by Rule 56(f)" by turning Rule 56(f) into a Catch 22 for "an unwary party who sincerely believes that additional discovery is needed to respond adequately to a summary judgment motion." Id. at 11.

The unwary party-Catch 22 argument is unconvincing, especially in the context of this case. The fact is that when they [sic] plaintiffs chose not to submit a substantive response to the defendants' motions, they were gambling that the Court would grant them a continuance or at least give them a second chance to submit a substantive response. Now that they have lost the gamble, the plaintiffs are trying to save their case by arguing that they had no choice but to do what they did.

The plaintiffs' Catch 22 hyperbole, however, rests on an unwarranted assumption. In order to make the case that they were "trapped" by Rule 56(f), the plaintiffs necessarily must argue that they could not simultaneously request a continuance and submit a response in opposition to summary judgment. Indeed, the plaintiffs argue that they "obviously cannot be expected **simultaneously**" to request a continuance and respond on the merits "for to do so might be viewed as casting doubt on the need for a Rule 56(f) request." Id. at 12 n.7 (italicization and bolding in original).

This proposition cannot be derived from the Federal Rules. As the Eighth Circuit has stated, "The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment." Hagerman, 839 F.2d at 414. Similarly, the Third Circuit has stated that the nonmovant is "under an obligation to respond to that motion in a timely fashion and to place before the court all materials it wishes to have considered when the court rules on the motion" Cowgill v. Raymark Indus., Inc., 780 F.2d 324, 329 (3d Cir. 1985).

Nor does the plaintiffs [sic] position make practical sense. For example, in the case of a truly meritorious request for a continuance it is likely that submitting a substantive response would strengthen the nonmovant's request by making it clear how a continuance would help. The plaintiffs' strategy also runs counter to the practice of pleading in the alternative. Finally, the plaintiffs' argument blithely ignores the fact that the defendants moved for summary judgement or dismissal. Requesting a continuance on a summary judgment motion clearly is not inconsistent with filing a substantive opposition to a motion to dismiss.

The plaintiffs' Request for a Continuance did ask that they be granted "an appropriate period in which to respond to the reconstituted motion to dismiss" if the Court chose to treat the defendants' motion as one to dismiss. Plaintiffs' Request for

Continuance at 4 n.2. This footnote, however, did not entitle the plaintiffs to ignore the motion to dismiss. (Nor did they have right to receive the information they asked for. See Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 196 (5th Cir.), cert. denied, 488 U.S. 926 (1988).) Nothing in Rule 56(f) or in any of the cases cited by the plaintiffs implies that the Federal Rules give such power to a party opposing a motion for summary judgment, let alone a motion to dismiss.

Not only is the foundation of the plaintiffs' Catch 22 argument unsound, but the obverse of the plaintiffs' analysis is more accurate; the Court, rather than the plaintiffs was in a bind. By refusing to respond directly to the motion to dismiss or for summary judgment and when they requested a continuance, the plaintiffs may have been attempting to force the Court to delay ruling on the merits. Alternatively, the plaintiffs may have feared that a substantive response to the defendants' motion would have undermined the merits of their request for a continuance. Indeed, this may be what the plaintiffs mean when they argue that a simultaneous request for a continuance and a response on the merits "might be viewed as casting doubt on the need for a Rule 56(f) request." In any case, the Court is satisfied that plaintiffs' counsel are not unwary innocents and that they made the choice not to respond on the merits with their eyes wide open.

The plaintiffs rely for legal support on an opinion which they claim "**has squarely held that a ruling identical to that made in this case is reversible error.**" Id. at 9-10 (citing Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984)) (italicization and bolding in the Memorandum). However, despite the plaintiffs' insistence that it applies "on all fours," Yashon does not control this case. First, Yashon is a Sixth Circuit, not an Eighth Circuit opinion.

Second, the portion of Yashon that the plaintiffs rely on is dictum. This "holding" was based on the premise that the plaintiff

had received unequivocal notice of the court's intention to enter summary judgment sua sponte against the plaintiff. Id. at 552. In fact, however, the district court in Yashon had entered judgment without any advance warning. Id. Therefore, the only factual basis for the Yashon court's reversal of the entry of summary judgment was the district court's failure to give the plaintiff unequivocal advance notice of its intent to enter judgment. In this case, on the other hand, the plaintiffs had unequivocal notice of the possibility that summary judgment would be entered against them.

Third, even if Yashon were an Eighth Circuit opinion and the relevant portion was not dictum, it would still be factually distinguishable. In a portion of the opinion that the plaintiffs quote, the Yashon court stated that the simultaneous denial of the continuance and entry of summary judgment wrongly deprived the plaintiff of the opportunity to respond "with whatever arguments and evidence in the record that he could muster." Id. The Yashon plaintiff had been unsure of the district court's intentions upon remand but suspected that summary judgment might be in the offing. Id. The plaintiff therefore requested a Rule 56(f) continuance in order to respond to a previously unbriefed issue presented by the Sixth Circuit's remand. Id. As the district court had already ordered a round of briefs on the remand issue, the plaintiff asked the court clerk whether a new briefing schedule would be ordered in light of the Rule 56(f) motion. Id. The clerk apparently informed him that he need not submit a brief until the court ruled on his client's motions. Id. Nevertheless, the court subsequently simultaneously denied the continuance and entered summary judgment against the plaintiff. Id.

The district court's actions in Yashon clearly induced the plaintiff not to brief the issue upon which the court, without prior notice, entered summary judgment sua sponte against the plaintiff. In contrast, the plaintiffs in this case were on notice of the possibility of summary judgment and had ample opportunity to

present "whatever arguments and evidence . . . [they] could muster" because, as already stated, the plaintiffs had the opportunity to respond to the defendants' motion with a memorandum supported by affidavits and exhibits. That the plaintiffs did not respond to the defendants' motion with the memorandum that Local Rule 7.1 provides for but instead submitted a request for a continuance does not imply that the plaintiffs were denied the opportunity to submit a response brief. As stated below, nothing precluded the plaintiffs from submitting a response brief in opposition to the defendants' motion at the same time they requested a Rule 56(f) continuance.

III. The Plaintiffs' Claims With Respect to Standard of Review are Not Cognizable Under Rule 59(e)

The plaintiffs' fourth argument is that the Court "violat[ed] the elementary standards for reviewing motions to dismiss and for summary judgment." Pl. Mem. at 12. As stated earlier, the purpose of a Rule 59(e) motion to alter or amend judgment is to correct manifest errors of law or fact or to present newly discovered evidence. Hagerman, 839 F.2d at 414. Hence, a party may not use such a motion to introduce new evidence that it could have presented during the summary judgment motion. Id. The plaintiffs point to no manifest error of law or fact committed by the Court with respect to the standard of review. Furthermore, the plaintiffs present no new evidence that they could not have presented to the Court before its ruling.

The Court ORDERS that:

1. based on the entire record, the plaintiffs' motion to alter or amend judgment pursuant to Rule 59(e) is GRANTED to the extent that the Order of October 19, 1992 is VACATED; in all other respects the plaintiffs' Rule 59(e) motion is DENIED;

2. based on the entire record and on the Court's bench ruling of October 15, 1992, except any matters outside the pleadings, the individual defendants' motion to dismiss all of the plaintiffs' claims based on: the Minnesota Arbitration Act; the Arbitrator's alleged bias; allegations that the Arbitrator misinterpreted the contract and that his reasoning and rulings were inconsistent; the untimeliness of Supplemental Awards Nos. 8 and 9; and all claims with respect to Supplemental Award No. 11 are GRANTED;

3. based on the entire record and on the Court's bench ruling of October 15, 1992, with respect to the plaintiffs' claims based on the untimeliness of Supplemental Awards Nos. 8 and 9, as an alternative to dismissal, the individual defendants' motion for summary judgment is GRANTED;

4. based on the entire record and on the Court's bench ruling of October 15, 1992, the individual defendants' motion for summary judgment on the claim that the Dispute Resolution Agreement did not contain a page 17 and a § X granting the Arbitrator the power to interpret the Agreement is GRANTED;

5. based on the entire record and on the Court's bench ruling of October 15, 1992, the plaintiffs' request for a continuance pursuant to Fed. R. Civ. P. 56(f) is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 3, 1992

ROBERT G. RENNER, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ROBERT D. KEHS, KENNETH LEBON, and STEVEN C. BILLINGS,

Plaintiffs,

v.

LARRY EUGENE FOSTER, JAMES CAMPBELL, and ROBERT STUART BLOEMER,

NORTHWEST AIRLINES, INC.,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants.

Civ. No. 3-91-827

ORDER

The judgment order entered in this case by the Clerk on December 3, 1992 is hereby vacated, as it was not issued in compliance with Fed. R. Civ. P. 54(b).

In a case involving more than one claim, Rule 54(b) permits the entry of final judgment on less than all of the claims "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b).

By an order dated December 3, 1992, this Court granted a motion by defendants Foster, Campbell, and Bloemer (individual defendants) for summary judgment. This order directed the entry of final judgment on the claims at issue in the summary judgment motion but failed to expressly determine that there was no just reason for delaying the entry of final judgment on those claims.

The Court finds that there is no just reason for delaying the entry of final judgment on the claims addressed by the December 3, 1992 grant of summary judgment. Therefore, the Court directs the entry of final judgment on the claims addressed by the Court's grant of summary judgment on December 3, 1992.

DATED: December 21, 1992.

ROBERT G. RENNER, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

ROBERT D. KEHS, KENNETH LEBON, and STEVEN C. BILLINGS, as the Merger Representatives of the Northwest Pilots,	)	
Plaintiffs,	)	
v.	)	Civ. No. 3-91-827
LARRY EUGENE FOSTER, JAMES CAMPBELL, and ROBERT STUART BLOEMER, as the Merger Representatives of the former Republic Pilots,	)	ORDER
NORTHWEST AIRLINES, INC., a Minnesota corporation,	)	
and	)	
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated labor organization,	)	
Defendants.	)	

The claims described in paragraph 2 of the Order entered by this Court on December 3, 1992 and ordered dismissed therein, are hereby certified for appeal pursuant to Rules 54(b), Fed. R. Civ. P.

In a case involving more than one claim, Rule 54(b) permits the entry of final judgment on less than all of the claims "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b). By an order dated December 3, 1992, this Court disposed of all claims brought by plaintiffs in their Second Amended Complaint. Judgment was entered by the Clerk accordingly. On December 21, 1992, the Court issued an Order vacating the December 3 Judgment Order entered by the Clerk for failure to comply with the requirements of Rule 54(b). In the December 21, 1992 Order, the Court found that there was no just reason to delay the entry of final judgment on claims disposed of by summary judgment in the December 3 Order and directed entry of final judgment on those claims, but failed to make similar findings with respect to those of plaintiffs' claims which had been disposed of by way of motion to dismiss in paragraph 2 of the December 3 Order.

The Court finds that there is no just reason for delaying the entry of final judgment on the dismissed claims addressed by paragraph 2 of its December 3 Order. The claims disposed of on summary judgment have been properly certified for appeal by way of the December 21 Order. As all of the plaintiffs' claims set forth in their Second Amended Complaint have been disposed of pursuant to dismissal and/or summary judgment, and as the only remaining claim in this case is a cross-claim between defendants which does not involve the plaintiffs, there is no just reason why plaintiffs should not be free to avail themselves at this time of their right to appeal from final judgment. Therefore, the Court directs the entry of final judgment on the dismissed claims described in paragraph 2 of the Court's Order of December 3, 1992, for the reasons set forth in that Order.

DATED: January 11, 1993

ROBERT G. RENNER, Senior Judge
United States District Court

APPENDIX B
STATUTES INVOLVED

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

. . .

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56 Summary Judgment

. . .

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve

opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

...

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.